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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1955.

## No. 699

UNITED STATES OF AMERICA,
*Petitioner,*

*vs.*

WHITE BEAR BREWING CO., INC., and CHICAGO TITLE AND TRUST COMPANY, as Trustee, et al.,
*Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

## BRIEF OF ILLINOIS BANKERS ASSOCIATION, AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING.

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## BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING.

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*To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

This brief is being filed on behalf of Illinois Bankers Association, pursuant to written consent, filed with this brief, of the parties to the case as required by Rule 42 of this Court.

Inasmuch as there was no lapse of time between the grant of certiorari and decision on the merits, *amicus curiae* has had no prior opportunity to present its views. There was no occasion to do so until certiorari was

granted, since there was no objection to the decision below and since the reason for presenting this statement could arise only when it became known that this Court would review that decision.

## I.

## INTEREST OF AMICUS CURIAE IN THE CASE.

The members of Illinois Bankers Association include 916 out of a total of 933 state and national banks located in Illinois. These members are required to and do furnish financing in all fields of trade and industry and in all aspects of the economy, from the manufacturer or producer down to and including the consumer. In doing so they necessarily rely upon many varied forms of security for loans, including in many instances the benefit and value of the liens accorded to contractors, subcontractors and suppliers under the mechanic's lien laws of the State of Illinois.

Accordingly these banks are vitally interested in determining the exact nature and extent of the priority to be afforded to *subsequent* Federal tax liens which may have the effect of destroying the value of the work and material contributed to a given project by the contractor, subcontractor and supplier whom the banks have financed, and who for more than a century have been given protection under the laws of the State of Illinois even as against prior encumbrances.

But the interest of Illinois Bankers Association, and of banks in general, is not limited to the particular form of security expressly involved in the issues in this case. The *per curiam* order of the Court, when combined with the language of the dissenting opinion of Justices Douglas and Harlan, causes grave and justifiable concern and

great uncertainty as to whether the rules of law resulting from the action of the majority of this Court through the *per curiam* order are intended to and do apply to a great number of forms of security which are recognized and afforded protection by state law and which may or may not fall within a strict or narrow interpretation of the special classes of security mentioned in §3672 of the Internal Revenue Code of 1939.

The lack of an opinion by the majority of this Court plus the statement in the dissenting opinion of the two Justices that:

> "The Court apparently holds that under 26 U.S.C. §3670 a lien that is specific and choate under state law, no matter how diligently enforced, can never prevail against a subsequent tax lien, short of reducing the lien to final judgment."

raises a substantial question as to whether loans made by banks on the security of assignments of accounts receivable, or on the basis of factors' liens, or through the use of trust receipts or conditional sale agreements, all of which are recognized and protected by the law of most states, are now vulnerable to *subsequent* Federal tax liens.

## ARGUMENT.

Wholly apart from the relative merits of the Petitioner's or Respondents' respective claims to priority, and whether or not the judgment appealed from is reversed or affirmed, the entry of the reversal order without a majority opinion leaves unsolved the question of whether in ordering such reversal the majority merely intended to hold that this particular lien did not meet the required tests for a choate lien as heretofore laid down by this Court, or whether the majority intends now to give to the word "choate" a definition so narrow as to include only the two types of lien holder, *i.e.* "mortgagee and pledgee", expressly mentioned in §3672, and that as a result the holders of all other forms of security must actually reduce their lien to a judgment before such lien holders can be protected against *subsequent* Federal tax liens.

We respectfully submit, therefore, that it is essential in any event to have the benefit of an opinion of this Court after submission of briefs and after oral argument.

### A.

### Mechanics' Liens Contrasted To Remedial Liens.

If the Court in reversing merely intended to hold that this particular lien was not choate because the lien had not been reduced to judgment, then we respectfully submit that the Court has overlooked or misapprehended the true nature and scope of a mechanic's lien under Illinois law.

In determining the status of a mechanic's lien in relation to *subsequent* Federal tax liens, we believe it is erroneous to treat mechanics' liens as though they had the same nature or status as liens arising from, as an

example, garnishment and attachment statutes. In the cases involving the priority of garnishment and attachment liens as against prior or subsequent Federal tax liens, it is always clear that the claim or debt sought to be recovered through the use of attachment or garnishment process did not arise, nor was it contracted for, in reliance upon or with a view to taking advantage of the given attachment or garnishment statute involved. Rather in those cases the remedy by way of attachment or garnishment arose in a sense as a mere happenstance, simply because it happened to be an available *remedy* under applicable statutes in the course of enforcing a *simple contract* or tort claim. There was therefore no equivalence between the amount of the attachment or garnishment and the specific amount eventually recoverable.

We respectfully submit that a mechanic's lien is not the same sort of "statutory lien" as an attachment or garnishment lien in the sense that on the question here involved this Court should apply the same standards that it does to those liens. Rather, as this Court has said in *Van Stone* v. *The Stillwell & Bierce Manufacturing Company,* 142 U.S. 128, 136,

> "The lien (mechanic's) is brought in operation by virtue of the statute, and the contract for building is entered into presumably in view of, or with reference to the statute."

The contractual or consensual nature of a mechanic's lien as contrasted with a lien by way of attachment or garnishment which comes into existence only through availability, by happenstance, of that kind of statutory process in the course of enforcing a simple contract or tort claim, is further shown by the provision of § 21 of the Illinois Mechanic's Lien Law to the effect that the owner and the

prime contractor may effectively contract that no such lien shall exist and that the effect of such a contract is to deprive all subcontractors, etc., of any right to a lien under the statute.

The Supreme Court of Illinois in the case of *Rittenhouse Co.* v. *Warren Co.*, 264 Ill. 619, held that a mechanic's lien was of such a contractual or consensual nature that it would be unconstitutional for the Illinois Legislature to deprive the parties of their freedom of contract by attempting to provide that the lien should exist notwithstanding a contract to the contrary by the parties.

It is one thing to compare, on the one hand, a lien given under the state law by way of *remedy* (*e.g.*, attachment or garnishment) for the collection of a simple contract or tort claim, with, on the other hand, the lien under § 3670 I.R.C. by way of *remedy* for collection of a tax, and to say in comparing those two *remedial* liens that the *remedial* liens given by state law are junior to the *remedial* lien given for Federal taxes. It is an entirely different thing to compare a lien which is *contractual and consensual* in its nature with the *remedial* lien given by § 3670 I.R.C., and to say that the *subsequent remedial* lien of the Federal government shall have the effect of striking down the contract rights of the parties under state law and abrogating express provisions of state law.

By allowing a *remedy* given to the Federal government by § 3670 I.R.C. to have priority over a mechanic's lien, the Court is allowing a *remedy* of the Federal government to deprive the holder of the mechanic's lien of the benefit and property rights acquired under § 16 of the Illinois Mechanic's Lien Law. So far as pertinent here that section provides as follows:

"No encumbrance upon land, created before or after the making of the contract under the provisions of this Act, shall operate upon the building erected, or materials furnished until a lien in favor of the persons having done work or furnished materials shall have been satisfied, and upon questions arising between encumbrancers and lien creditors * * * the lien creditor *shall be preferred* to the value of the improvements erected on said premises * * *."

A mechanic's lien grows out of a direct enhancement of the *value* of the particular property in question. The lien holder has added to the estate of the taxpayer an increment of value and it appears highly inequitable that when he has done everything possible to pursue his lien, short of reducing his claim to judgment, the Federal government should be permitted to deprive him of his right under state law to recover that enhanced value.

Expansion of the doctrine announced by this Court in attachment and garnishment cases to extend it to perfected liens like a mechanic's lien is not required by the earlier decisions of the Court. In the only other mechanic's lien *v.* Federal tax lien case to come before the Court (*United States* v. *Colotta,* 350 U.S. 808 (1955)) the mechanic's lien had not been recorded, nor had any *lis pendens* notice been filed, before the Federal tax lien arose. In the present case the record shows that the lien had been recorded and suit to foreclose had been commenced before the first of the assessment lists was received by the Collector.

The effects, both direct and indirect, of any such extension of the doctrine are most alarming in business and construction circles. It casts a shadow not only on much of the construction financing but also upon numerous financing and security arrangements that have been accepted as giving an unquestioned priority against *subsequent* Federal tax liens even though they are not specifically designated in §3672.

**B.**

**Nothing in § 3672 of the Internal Revenue Code of 1939 as Amended Adversely Affects, As Against Subsequent Federal Tax Liens, Prior Contractual or Consensual Liens Perfected Under State Law.**

We respectfully submit that there is no reason to believe that when Congress first passed § 3672 I.R.C. in 1913, and thereafter amended it from time to time to extend the protection against *secret antecedent* Federal liens, Congress also intended to limit to the specific classes therein described, *i.e.*, "mortgagee, pledgee, purchaser or judgment creditor," protection against *subsequent* Federal tax liens. Nevertheless the lack of a majority opinion of the Court in this case, when coupled with the remarks made in the dissenting opinion, necessarily leaves room for the interpretation that this Court is now holding that § 3672 has this double effect.

If that is the intended result of the *per curiam* order in this case, the effect is indeed awesome to contemplate. While exact figures are not available, we believe it fair to state that banks throughout the country have in the aggregate on their books loans running into many billions of dollars secured by what have always been considered perfected choate liens under state laws even though such liens might or might not come within a strict interpretation of "mortgage or pledge" as used in § 3672. The kind of liens we refer to are those arising out of assignments of accounts receivable, out of so-called Factor's Lien Acts, arising from the use of the Uniform Trust Receipts Act (which has been adopted in 31 states), from conditional sales agreements and from many kindred forms of security. An article in The Commercial and Financial Chronicle of Tuesday, March 8, 1956, points out that the National Commercial Finance Conference Inc.

reports that in 1955 financing by members of that Conference alone (which does not include banks) of accounts receivable totalled approximately $4.9 billion. In the same report it was disclosed that 24 factoring concerns operating in and around the New York metropolitan area accounted for an over-all volume of $3.150 billion in 1955.

So long as § 3672 is interpreted to apply only to *antecedent* Federal tax liens, and so long as liens (at least those that are contractual or consensual in nature) which have been perfected under applicable state law are unaffected by *subsequent* Federal liens, it is at once apparent from the results that the financing which the economy of the country requires has been and can be effectively carried on. Since, except in the few instances involving liens on ships, railroad cars or airplanes, there is no Federal law providing for the manner of perfecting liens between private parties to secure private debts, it is essential that state law exist whereby, at least in the field of contractual or consensual liens, liens may be perfected.

We respectfully submit that when Congress in 1913 originally passed what is now § 3672, and later from time to time amended it to remove deficiencies which made some *secret antecedent* Federal tax liens superior to certain forms of security, Congress believed that no provision was necessary to protect prior liens against *subsequent* Federal tax liens because such prior liens, at least in the field of contractual and consensual liens, would be protected by the usual priority rule of "first in time, first in right." The Report of the House Judiciary Committee which accompanied the 1913 amendment clearly shows this, and because only a part of that Report is referred to in Justice Jackson's concurring opinion in *United States* v. *Security Trust & Savings Bank,* 340 U.S. 47, 52, we are attaching as Appendix A a complete copy of that Report.

One sentence from that Report is most significant in connection with this particular phase of the problem:

> "There is no reason why the Government should not occupy the same position with reference to liens on property as does the individual."

Certainly in the field of contractual liens which have been perfected under applicable law, this statement would include, at least, the principle that first in time is first in right. For this Court now to apply in the field of contractual and consensual liens its own test of what is and what is not a choate lien in substitution for what is and what is not perfection under applicable state law, is to change the 1913 amendment and the intent of Congress in connection with it from the protection of liens against *secret antecedent* Federal tax liens into a weapon to strike down, for the benefit of *subsequent* Federal tax liens, contractual and consensual liens which have been fully perfected under applicable state law.

It is important also to note that when Congress amended § 3672 in 1939, there were already a significant number of lower Federal Court decisions which had held that an antecedent statutory lien which was "inchoate" by the standards laid down by this Court in attachment, garnishment and similar cases, nevertheless had priority over *subsequent* Federal tax liens. Under those cases the fact that the statutory lien was inchoate was regarded as so immaterial that the question was not even investigated by the Court.* Some of those lower court cases go back to the early 1930's and some to the 1920's. In the face of those cases Congress did nothing to assert the

*A good collection of those cases is assembled in Kennedy, "The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien", appearing in 63 Yale Law Journal 905, 924, f.n. 115.

riority of *subsequent* Federal tax liens against such in-
ioate liens, although it was at the same time amending
3672 to give greater protection to the public against
*ecret antecedent* Federal tax liens by specifically includ-
ng "pledgees" in the class of lien holders protected
gainst unrecorded liens, and by creating an exception
ith respect to "securities" as therein defined as to even
*ntecedent recorded* Federal tax liens.

To decide to affirm the decision below, it is not neces-
ary for this Court to overrule or disregard any of its
rior decisions. This is so because, as already pointed
ut, none of its previous decisions, excepting only possibly
e *per curiam* order in this case, necessarily implies or
olds that contractual or consensual liens perfected under
pplicable state law must also undergo a test of meeting
andards of being "choate" or "inchoate" as determined
y this Court on the basis of the facts in each particular
ase. To apply its own test to contractual or consensual
ens will inevitably lead this Court into the dilemma of
olding that some uncertainties are sufficient to subordi-
ate some contractual or consensual liens to *subsequent*
ederal tax liens, whereas exactly the same uncertainties
ill have no adverse affect upon other contractual or
onsensual liens which happen to fall within the definition
f a "mortgage" or "pledge" under § 3672. As an ex-
mple, when a suit is instituted to foreclose a mortgage
nder Illinois law, it is possible that the asserted lien of
e mortgage is just as "uncertain" or "inchoate" as the
overnment contends the mechanic's lien is in this case,
the sense that the Court must still decide whether (i)
e're are any prior liens, (ii) there are any defenses to
e validity of the mortgage, and (iii) there are any
efenses, counterclaims or set-offs to reduce or wipe out
e amount claimed by the plaintiff to be secured by the
ortgage. If those uncertainties are to adversely affect

a mechanic's lien, or any other lien not qualifying as a "mortgage" or "pledge", there would appear to be no logical reason why the same uncertainties should not similarly adversely affect a mortgage as against *subsequent* Federal tax liens. The illogical result of that dilemma would be to protect, because of the express wording of § 3672, mortgages and pledges as against *secret antecedent* Federal tax liens, but to destroy such mortgages or pledges as against *subsequent* and presently non-existing Federal tax liens.

## CONCLUSION.

In view of the foregoing, a rehearing should be granted so that the questions discussed above can be fully presented by brief and oral argument.

Respectfully submitted,

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## APPENDIX A.

### Lien For Taxes.

July 17, 1912—Referred to the House Calendar and ordered to be printed.

Mr. Sterling from the Committee on the Judiciary, submitted the following

### Report.

[To accompany H. R. 25780]

The Committee on the Judiciary, to whom was referred the bill (H. R. 25780) to amend Section 3186 of the Revised Statutes of the United States, report the same to the House with the recommendation that it do pass.

Section 3186 of the Rev. Stats. is as follows:

> "Sec. 3186 If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount shall be a lien in favor of the United States from the time it was due until paid, with the interests, penalties, and costs that may accrue in addition thereto upon all property and rights to property belonging to such person."

This section makes any delinquent tax due the United States a lien on all the property of the person delinquent in the payment of the tax, wherever it may be situated within the United States. A person proposing to buy the property of another could protect himself against such a lien only by ascertaining from all the collectors in the United States whether or not the vendor was delinquent in the payment of taxes. This would be a great hardship and would make it practically impossible for any

person proposing to buy property to secure himself against such liens. The same hardship would devolve upon mortgagees and judgment creditors. It is proposed to amend the section by adding the following:

> *"Provided, however,* that such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice of such lien shall be filed by the collector in the office of the registrar or recorder of deeds in the county or counties, or parish or parishes in the State of Louisiana, within which the property subject to such lien is situated: *Provided further,* that the provision herein relating to the filing of notice shall be applicable whenever, and only whenever, the laws of the State wherein the property is situated shall authorize the filing of such notice in the office of the registrar or recorder of deeds as provided herein."

The amendment becomes effective in any State only when the legislature of that State authorizes the filing of notice of such lien by the collector in the office of the registrar or recorder of deeds of the county or parish where the property is situated.

It provides a very simple means of giving this notice that would not at all be burdensome upon the Government.

In the case of the *United States* v. *Snyder* (149 U.S. 210) the Supreme Court held that the lien created by sec. 3186 is a valid and binding lien even against a *bona fide* purchaser or encumbrancer in good faith for value, without knowledge or notice of the existence of such a lien. The Federal statute makes no provision for giving notice, constructive or otherwise, of the lien created by said section, and in the case above cited it was held that the recording acts of the several States have no force or

effect as against the lien of the Government; and the lien is so comprehensive that it covers all the property and rights to property of the delinquent situated anywhere in the United States, and any person taking title to real estate is subjected to the impossible task of ascertaining whether any person, who has at any time owned the real estate in question, has been delinquent in the payment of the taxes referred to while the owner of the real estate in question. The business carried on under the internal revenue law may be at a great distance from the property affected by this secret lien, but this will not relieve the property from the lien.

The recent act relating to excise tax by corporations makes it imperative that some legislation of this kind be enacted in order to protect the transfer of property, and to facilitate business transactions. There is no reason why the Government should not occupy the same position with reference to liens on property as does the individual.

It is believed that the States will very readily pass legislation authorizing the filing of notice in the office of the registrar or recorder of deeds, in order to protect its citizens in business transactions against liens which the citizens cannot know of except at great cost of money and time. This law simply gives the States the opportunity to do so if it wishes to save its citizens from this unnecessary burden.

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## BRIEF OF THE ILLINOIS STATE FEDERATION OF LABOR, AMICUS CURIAE, IN SUPPORT OF PETITION FOR REHEARING.

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## STATEMENT.

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Written consent to the filing of this Brief, *amicus curiae,* in support of the Petition for Rehearing, has been obtained from all parties hereto and has been filed with the Clerk, as provided in Rule 42 of this Court.

## INTEREST.

The interest of the Illinois State Federation of Labor as *amicus curiae* in this proceeding derives from the fact that as an autonomous, non-governmental, voluntary labor organization composed of over 500 local unions and consisting of more than 1,100,000 members in the State of Illinois, a large percentage of whom are engaged in the building trades industry and who are dependent upon the effectiveness and enforcibility of liens provided by the statutes of the State of Illinois for the security of their wages and earnings in the construction industry.

The Illinois State Federation of Labor is deeply concerned with the question of whether a recorded mechanic's lien is superior or inferior to a subsequent federal tax lien and it is of substantial and wide-spread public importance, especially to the labor and construction industry.

Mechanic's lien statutes have been enacted by the states for the protection of suppliers of labor and material who enhance the value of real estate of others. If the federal government, by means of a secret lien, can unjustly enrich itself at the expense of the laboring and material man, then the protection heretofore afforded by mechanic's lien statutes is lost. The ever-present threat of a lurking secret federal tax lien would, no doubt, be a serious deterrent to the undertaking of much of the reconstruction and rehabilitation work which is so sorely needed throughout the nation. The loss of protection of the state mechanic's lien statutes would of necessity require the posting of adequate security by contractors undertaking construction work sufficient to meet the wages of the laboring man.

The decision of the question before this court and the implications of the decision is of such significance that it is most desirable to have the benefit of an opinion of this court after submission of briefs and argument.

## ARGUMENT.

### I.

**THE EFFECT OF THE PER CURIAM DECISION UNDER THE CIRCUMSTANCES OF THIS CASE WILL BE CHAOS AND UNDUE HARDSHIP IN THE BUILDING TRADES AND RELATED INDUSTRIES.**

Before arguing the law applicable to the facts of this case, it might be well to illustrate the probable and almost inevitable effect of the *per curiam* decision of this Court. A is the owner of a large industry that employs many people and reputedly of large earnings. In May, 1956, he contracts with B to build a residence on lots owned by him for the sum of $60,000.00, and thereupon B purchases material and employs laborers. Depending upon the promise of A to pay the full contract price, B accumulates large obligations. In January, 1957, the building nears completion, A, however, neglects to pay to the Government the withholding tax of some several hundred of his employees, amounting in round figures to $60,000.00. On January 10, 1957, B becomes uneasy and causes his attorney to check the records in the County in which the property is located and finds that there is recorded against the property no liens of any kind or character. He thereupon files his own mechanic's lien as provided by the statute of the State of Illinois and begins suit to foreclose this lien. On February 1, 1957, the Government places an assessment in the hands of the Collector. This action by the Government under the *per curiam* opinion becomes a lien on this property superior to the lien of the contractors and the laborers, who have by their materials and effort enhanced its value.

Now if this secret lien of the Government for taxes accruing long after the contract has been entered into and

growing entirely out of a separate industry, is held to be superior to the statutory lien created by the statutes of the State of Illinois and relied upon by the contractor, his material suppliers, and the laborers, it will result in the impoverishment of the contractor, the defrauding of the material suppliers, and the loss of wages to the laborers; thereby entailing unknown hardships to their families, and the nullification of the mechanic's lien statute. This will result in confusion in the building trades industry, and it will require the contractor, the laborer and the supplier to demand security in addition to the property that their material and labor enhanced. It will prevent many young people from building homes sorely needed by their families, because of their inability to supply the additional security made requisite by the construction now given by this Court. The result will be inferior housing and lower standards of living and will impose an additional burden upon interstate commerce, a result certainly never contemplated by the Congress.

## A.

## The Per Curiam Decision of This Court Exposes Lienors to the Hazard of Secret Liens.

Under the above given example, B, in seeking to ascertain all relevant facts and possibilities of liens or encumbrances upon the property, and asserting all due diligence, finds himself in the position of relying upon the records of the county in which the property is situated, and yet, he is still unable to protect his prior perfected lien.

The lien of the government is secret. 26 U.S.C., Sec. 55 makes it a misdemeanor for a federal employee to disclose any information.

Under the authority of 5 U.S.C., Section 22, the Treas-

ury Department, through the Commissioner of Internal Revenue, at an early date issued instructions forbidding the disclosure of the contents of the records in the offices of the various collectors of internal revenue. 165 A.L.R. 1302, 1355. In 1898 these instructions were promulgated as certain general rules for the collectors and subordinates. 165 A.L.R. 1302, 1358.

Thus the "lien" of the government is secret in every sense of the word. In practical application, B, the lienor, will not be able to ascertain whether A is delinquent in his payment of taxes, as the interests of the two parties are hostile to each other. Without the consent of the taxpayer the procedure required to secure the information from the Internal Revenue Service is so time consuming and cumbersome if it is at all available as to be of practically no effect. Time is of the essence if B must perfect his lien and preserve the priority intended under the state mechanics lien laws. The final and inevitable result is that B must act at his peril, unable to effectively protect the many interests involved against such government secret liens.

The *per curiam* opinion of this Court has in effect stated that a prior, perfected, choate mechanic's lien as determined by federal law in the courts below is still subordinate to a subsequent, secret, unrecorded federal lien. Under these circumstances, though Congress has not stated in Section 3670 that a priority lien shall be established, this Court has so construed the Section. A therefore can only protect his priority if he becomes a judgment purchaser and it is an obvious fact that under the laws of the State of Illinois, a purchaser from a decree of foreclosure, does not receive a deed until after the fifteen-month period of redemption has elapsed, and is therefore not possessed of true and complete title until fifteen months after the sale. (Chapter 77, Sec. 16-18, Illinois Revised Statutes (1955).) It could not have been the intent of Congress that by

merely using the word "lien" in Section 3670, it intended to nullify the laws of the State of Illinois in regard to foreclosure of mechanic's liens.

B.

**The Supreme Court of Illinois Determines the Rights of Lienors Under Illinois Statutes.**

This Court has held that the question of perfection of a lien is a matter of federal law. *United States* v. *Scovil, et al.*, 348 U.S. 218, 99 L. ed. 271, 75 S. Ct. 244; *United States* v. *Waddill, Holland and Finn*, 323 U.S. 353, 89 L. ed. 294, 65 S. Ct. 304.

It has also been held by this Court, however, that the nature of the *rights* flowing from the mechanic's lien in Illinois must be determined by the law of Illinois. *Spokane County* v. *United States*, 279, U.S. 80, 73 L. ed. 621; *United States* v. *Waddill, Holland, and Finn*, 323 U.S. 353; 89 L. ed. 294, 65 S. Ct. 304; *United States* v. *Texas*, 314 U. S. 480, 487, 86 L. ed. 356, 362, 62 S. Ct. 350, 48 An. Bankr. N.S. 514.

The Illinois Supreme Court has held that a mechanic's lien claimant has a lien from the date of his contract which can be defeated only by a failure to file the notice thereof within four months after the completion of work. *United Cork Companies* v. *Volland*, 365 Ill. 564, 7 N. E. (2d) 301. The mechanic's lien statute of the State of Illinois has the effect of giving the claimant superior and complete right to the proceeds of the property involved. Thus the right flowing from the mechanic's lien statute is the right of a paramount encumbrance even as against a mortgage. *Noel State Bank* v. *Blakely Real Estate Improvement Co., et al.*, 321 Ill. App. 594, 53 N. E. (2d) 621.

Illinois construes the mechanic's lien act to become part of any contract between the land owner and the contractor for the erection or improvement of a building. *Robertson*

v. *Huntley and Blazier Company,* 351 Ill. App. 378, 115 N. E. (2d) 533; *Dunbar* v. *New York,* 251 U. S. 516, 64 L. ed. 384.

In light of the holding in *Noel State Bank* v. *Blakely Real Estate Improvement Co., et al.,* 321 Ill. App. 594, 53 N. E. (2d) 621, and the factual situation there involved, the decision of the Supreme Court of Louisiana in *Louisiana State University* v. *Hart, et al.,* 210 La. 78, 26 So. (2d) 361, 174 A. L. R. 1366, at 1372 and 1373, becomes extremely pertinent, where the Court said:

> "It is undisputed that Section 3670 of the Internal Revenue Code creates a tax lien but does not give it priority. It is also undisputed that the general lien created by that statute is inferior to prior mortgages or equitable or legal liens and encumbrances. It would seem to be anomalous, therefore, to say that if a mortgage intervened between the date the attachment was obtained by the Louisiana State University and the date the tax lien of the United States arose, the privilege or the lien of the University would be superior to the mortgage, which, in turn, would be superior to the tax lien of the United States, but that the tax lien of the United States, would be superior to the privilege of the University. That, however, is the situation that would result if the argument on behalf of the United States is followed to its logical conclusion. We do not think the law sanctions such an anomalous situation."

## II.

**THE EFFECT OF THE PER CURIAM DECISION IS TO DEPRIVE A PARTY OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW.**

The Fifth Amendment to the Federal Constitution provides that property may not be taken without due process of law. The District Court and Court of Appeals have held the instant lien to be choate. A choate lien is property